No. 14934

United States
Court of Appeals
For the Ninth Circuit

GREAT NORTHERN RAILWAY COMPANY, a corporation,

APPELLANT,

v.

LUMBER AND SAWMILL WORKERS, LOCAL UNION NO. 2409, A VOLUNTARY ASSOCIATION AND LABOR UNION, HELEN M. BOUCHEY, INDIVIDUALLY AND AS PRESIDENT OF SAID LABOR UNION, DORIS M. TRAYNOR, INDIVIDUALLY AND AS SECRETARY OF SAID LABOR UNION, RAY F. LINDBERG, INDIVIDUALLY AND AS FINANCIAL SECRETARY OF SAID LABOR UNION, LEONA L. STEIN AND JOSEPH S. BOGARD,

APPELLEES.

Brief for Appellant

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JURISDICTION

The jurisdiction of this Court and of the District Court in this case is granted,

(a) By Section 1332 of 28 U.S.C.A., by reason of the diversity of citizenship of the parties, and the amount involved (R. 4-5).

The allegation in the complaint that the amount involved exceeds $3,000.00 is admitted by defendant's motion to dismiss.

KVOS v. Associated Press, 299 U. S. 268, 81 L. Ed. 183-187.

(b) By Section 1331 of 28 U.S.C.A., giving Federal courts jurisdiction in cases arising under Fed-

eral statutes where amount involved exceeds $3,000.00, taken in connection with the Interstate Commerce Act, Section 1 of 49 U.S.C.A. and the penalties therein imposed.

(c) By Sections 1336 and 1337 of 28 U.S.C.A. providing jurisdiction, without reference to amount involved, in cases arising under any Act of Congress regulating commerce.

(d) For statement of the fact situation, refer to Statement of Facts, this brief.

In Re Lennon, 166 U.S. 548, 41 L. Ed. 1110.
Brotherhood of R. R. Trainmen v. Swan (7 C.A.A) 214 F. (2) 56.
S. E. Overton v. International Brotherhood of Teamsters (Mich.) 115 F. Sup. 764, 768.
Pacific Gamble Robinson Co. v. M. & St. L. R. Co. (Minn.) 83 F. Sup. 860.

STATEMENT OF THE CASE

By its complaint in the United States District Court for the District of Montana, (R. 10) the plaintiff and appellant, Great Northern Railway Company, seeks injunctive relief to remove from its railroad right-of-way leading to the Foley's Mill plant in Helena, Montana, the picket line being maintained by the defendants and appellees, the Lumber and Sawmill Workers Local Union No. 2409, its officers, agents and associates on strike against the Foley's Mill, in order that the Railway Company may serve the Foley's Mill in interstate commerce, as it, as a common carrier by railroad engaged in interstate commerce, is required to do

by the provisions of the Interstante Commerce Act of Congress, 49 U.S.C.A., Section 1 (4) (17).

QUESTIONS INVOLVED

The controlling question involved here is: Is the appellant Railway Company, in the performance of its duty under the Interstate Commerce Act. (49 U.S.C.A. 1, etc.) to serve all the public, denied the right to go into the courts for injunctive relief agains Union pickets upon its right of way, by either the Norris-LaGuardia Act (29 U.S.C.A. 104-113), or by the Taft-Hartley Act (29 U.S.C.A. Supp. 151-158)?

MANNER IN WHICH QUESTION IS RAISED

The Order and Judgment of the District Court sustains deefndants' Motion to Dismiss the first cause of action set up in the Complaint upon grounds that the Complaint fails to state a claim against defendants upon which injunctive relief can be granted, and this appeal is from that Order and Judgment. (R. 34)

SPECIFICATIONS OF ERRORS

((1) The United States District Court erred in holding that the complaint discloses that this case involves or grows out of a labor dispute, under the provisions of subsection (a) of Section 113 of 29 U.S.C.A. (Norris-LaGuardia Act) so as to preclude injunctive relief under the Sections 52 and 104 of 29 U.S.C.A.

(2) The United States District Court erred in

holding that the complaint discloses that plaintiff, Great Northern Railway Company or its employees, are either a person or association participating or interested in the labor dispute existing between defendants and the Foley's Mll, under the provisions of subsction (b) of Section 113 of 29 U.S.C.A., so as to preclude injunctive relief under the Sections 52 and 104 U.S.C.A.

(3) That the United States District Court erred in its failure to consider the Interstate Commerce Commission's Order No. 904, Exhibit "A" to the Complaint, imposing the further obligations upon the plaintiff as a common carrier to deliver and receive freight cars to and from the Foley struck plant within the 24 hour time limit provided by said Order, with its attendant severe penalties imposed on the carrier for falure to comply with the Order.

(4) The United States District Court erred in holding that the plaintiff Railway Company was not entitled to injunctive relief from the Union pickets occupying the ralroad right-of-way and interfering with and delayng the spotting and removing of cars at and from the struck plant by non-union supervisory officials of the Railway Company as set forth in the complaint.

(5) That the United States District Court erred in holding that the appellant Railway Company had access to the National Labor Relations Board under Sections 151-159 of 29 U.S.C.A. Supplement (Act of 1947) for relief against the picketing being maintained against it by defendants, and that such right

of relief before N.L.R.B. excludes jurisdiction in the courts to grant injunctive relief against defendants maintaining the pickets.

(6) That the United States District Court erred in granting defendants' motion to dismiss the first cause of action set forth in the complaint and in dismissing the complaint as to said first cause of action.

FACT SITUATION

The complaint discloses that for approximately two years last past and now, a labor dispute has and does exist between the defendants and Foley's Mill situated on a spur track of plaintiff Railway Company in the City of Helena, Montana, which spur track crosses Roberts Street; that in the prosecution of that dispute, the defendants, with a picket line, block with their bodies, the spur track as it crosses Roberts Street, preventing the delivery and receipt by the Railway Company of freight cars with interstate shipments of merchandise to and from the Foley Milli; the plaintiff's regular switch crew refuses to move its train through the picket line; that at the expense of much money costs and delay in time, the plaintiff Railway Company requires a crew of its supervisory officials to periodically travel the 95 miles from Great Falls, Montana, to Helena for the purpose of handling the switch engine in serving the Foley's Mill; that upon arrival of the crew from Great Falls, the plaintiff Railway Company calls for the Helena police, who have in the past responded and removed the pickets

from the railroad crossing, permitting the substitute switch crew to remove and spot the accumulation of cars from and to the Foley's Mill; that since January 1, 1954, there have been 152 such cars to be handled at a cost of 165 man days, and a money cost of $5,500.00; that by its Order, Exhibit "A" to the complaint (R. 12) the Interstate Commerce Commission, because of car shortage, requires plaintiff Railway Company to handle cars for shippers from and to its local yards on a 24-hour schedule, and without regard to whether or not the particlar car does, or is immediately to carry freight in interustate commerce; that plaintiff Railway Company has not supervisory officials in sufficient numbers available to comply with the 24-hour schedule, and is thereby subject to the penalties up to $500.00 for each offense, plus $50.00 per day of delay, under the Interstate Commerce Act of Congress (49 U.S.C.A. Section 1 (17); and that the defendants threaten to and will, unless enjoined by the Court, continue in the future such interference with the operation of the railroad, subjecting plaintiff Railway Company to the penalty of indefinite amounts in damage and for failing to serve the Foley's Mill, and to indefinite amounts of penalties for failure to comply with the Order, Exhibit "A" (R. 7 and 10).

ARGUMENT

The appellant Railway Company here seeks injunctive relief in the courts to remove the defendant pickets from its right-of-way so as to enable it to comply with the Interstate Commerce Acts of Con-

gress (49 U.S.C.A. 1 (17)) requiring the Railway Company to furnish interstate rail service to all the public, including shippers involved in a labor dispute.

It is unreasonable to assume that by the labor laws the Congress meant to place in the Unions the power, through pickets, to tie up all rail service, so vital to the daily welfare of this community, leaving the community without injunctive relief through the courts, and entirely helpless for the period of time required for it to get relief through proceedings before the National Labor Relations Board—a single tribunal with exclusive jurisdiction to handle all such matters for the whole country, much of which is thousands of miles distant from the seat of that Board in Washington, D.C.

The foregoing is no fanciful suggestion, in that if the labor laws are so interpreted as to empower the Union pickets to tie up one industry track of the appellant Railway Company in this community without relief except through proceeding before the National Labor Relations Board, then by the exercise of the same power, the Union may picket the main lines of the two railroads serving this community to increase the economic pressure on the one struck plant, leaving this whole community helpless and without rail service, and without recourse to the courts, until relief may be had through the National Labor Relations Board.

EFFECT OFNORRIS-LaGUARDIA ACT

The Norris-LaGuardia Act (29 U.S.C.A. 104-

113) does not deny injunctive relief in the courts except that the court Order interferes with a "labor dispute" and is sought by a person "interested directly or indirectly" in that labor dispute.

LABOR DISPUTE DELIMITED

A "labor dispute" is defined in each, the Act of March 23, 1932 (29 U.S.C.A. 113 (c), the Act of June 14, 1935 (29 U.S.C.A. 152 (9), and in the Act of June 23, 1947 (29 U.S.C.A. Sup. 152 (9) in this language:

> "(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."
>
> "(a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft or occupation; or have direct or indirect interests therein; or who are employees of the same employer;" etc. (29 U.S.C.A. 13).

INTEREST IN LABOR DISPUTE DELIMITED

> "(b) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him or it, and if he or it is engaged in the same industry, trade, craft, or occupation in which such dispute occurs, or has a direct or indirect interest therein," etc. (29 U.S.C.A. 113 (b)).

NORRIS-LaGUARDIA ACT HAS NO APPLICATION IN THE INSTANT CASE

No relief is sought by the Union against the appellant Railway Company in the labor dispute between the Union and the Foley's Mill, and therefore, the appellant Railway Company is not "A person or association . . . participating or interested in" the labor dispute existing between the Union and the Foley's Mll. Therefore, the Norris LaGuardia Act (29 U.S.C.A. 104-107) does not withhold from the appellant Railway Company the right to injunctive relief in the courts against the pickets occupying its right-of-way.

TAFT-HARTLEY ACT DELIMITED

The allegations of the complaint do not bring our case here within the orbit of the Labor-Management Relations Acts of the Congress, so as to give the National Labor Relations Board exclusive jurisdiction to grant relief.

That Board is given exclusive jurisdiction for the arbitrament of a limited group of acts therein defined and described as "unfair labor practices." and therefore, the National Labor Relations Board has no jurisdiction over the controversy described in the complaint.

Subsection (b) (4) of the Section 158, among the statutory definitions, provides:

> "It shall be an unfair labor practice for a labor union or its agents
>
> * * * *
>
> "(4) to engage in, or to induce or encourage

> the employees of any employer to engage in, a strike or concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or to perform any service where the object thereof is: (a) forcing or requiring . . . any employer or other person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;" etc.

QUESTION FOR DECISION HERE

Our case on this appeal resolves itself into the two questions:

(1) If it is assumed, for the sake of the argument, that insofar as the Union's acts of maintaining pickets on the right-of-way of the appellant Railway Company is for the *object* of inducing appellant's regular switch crew to refuse to transport goods to the Foley's Mill, is a matter for the exclusive jurisdiction of the National Labor Relations Board, has that Board any jurisdiction over the question of appellant Railway Company's right to injunction to remove the pickets from its right-of-way and interfering with appellant's efforts to furnish service to the struck plant by means of its officials, in order to comply with the Interstate Commerce Acts requiring the Railway Company to furnish service to the struck plant? And,

(2) Has the National Labor Relations Board jurisdiction to decide as between the Interstate Commerce Act requiring the rail service to the struck

plant and the effect of the labor laws interfering with that duty to furnish rail service in a situation as here, where no relief is sought from the Railway Company by the Union in its dispute with the struck plant, Foley's Mill?

We recognize that the Supreme Court has recently (January 9, 1956) held in the New Haven Railroad "piggy-back" case that when the labor dispute is between the Union (non-railway union) and the Railroad to obtain relief directly from the railroad with the object of creating jobs for the union members, the N.L.R.B. has jurisdiction to the exclusion of the courts. But the fact that in the New Haven case relief was sought by the Union directly against, and which the Railroad had within its power to grant, increasing jobs for the Union members, distinguishes the New Haven case from our case before this Court.

LABOR UNION RIGHTS VERSUS RAIL SERVICE

It seems to us that the Congress, by the labor laws, did not intend to put the rail service to the whole country at the mercy of the labor unions and proceedings before the National Labor Relations Board, but that where, as here, the Union seeks no relief from the Railway Company in its labor dispute with the prospective shipper, the question of the Railway Company's obligation to furnish rail service under the I.C.C. Acts of Congress being protected by the courts, as opposed to the Union's right to have its acts submitted to the N.L.R.B. under the

labor laws, is not one to be resolved by the Board under its limited jurisdiction.

The following seven cases from Federal District Courts and three from the highest State courts hold for the Court's jurisdiction to grant injunctive relief on the suit by the Railway:

Erie R. Co. v. Local 1286 of Longshoremen, etc. (N.Y.) 117 F. Sup. 157.
Pacific Gamble Robinson Co. v. M. & St. L. Ry. (Minn.) 85 F. Sup. 65.
Illinois C. R. Co. v. International Brotherhood of Teamsters (La.) 90 F. Sup. 640.
Louisville & N. R. Co. v. Local Union, etc. Woodworkers, etc. (Ala.) 104 F. Sup. 748.
Montgomery Ward, etc. v. Northern Pac. Terminal Co. (Ore.) 128 F. Sup. 475.
Southern Pacific v. Cannery Warehousemen (Ore.) 127 F. Sup. 703.
Hunt v. Crumbock (Pa.) 44 F. Sup. 796.
Northwestern Pac. R. Co. v. Lumber & Sawmill Workers Union (Calif.) 189 P. (2) 227.
Burlington Transpn. Co. v. Hathaway (Iowa) 12 NW (2d) 167.
General Drivers, etc. Union v. American Tobacco Co. (Ky.) 264 S.W. (2) 250.

In the following cases, in which the employer-employee relationship did not exist, but where the Union sought relief directly from the employer with the object of creating jobs for its Union members, the Supreme Court, construing the labor laws, has held against Court jurisdiction to grant injunctive relief:

New Negro Alliance v. Sanitary Grocery, 303 U.S. 552, 82 L.Ed. 1012, to force the grocery company to accept negroes as employees.
Milk Drivers, etc. v. Lake Valley, etc. 311 U.S. 91, 85 L.Ed. 63, to force Chicago stores to

discontinue dealing with Lake Valley and take milk from wholesalers employing Union drivers.

Joseph Garner, et al v. Teamsters, etc. Union, 346 U.S. 485, 98 L.Ed. 228, to force Garner to compel his employees to join the defendant Union.

Weber v. Anheuser-Busch, Inc., 348 U.S. 468, 99 L.Ed. 546, to force the Brewery to allot certain work to Weber's Union, as against another Union.

Local Union etc. Teamsters v. New York, New Haven & Hartford R. Co., deciedd January 9, 1956, to force the Railroad to discontinue the service of "piggy-back" truck trailers, with a view to increasing jobs for the Union members.

WHAT IS NOT A LABOR DISPUTE

In the following cases the Supreme Court has held no "labor dispute" was involved, and that therefore jurisdiction in the courts to grant injunctive relief on application by the aggrieved party was not denied by the labor laws.

Dorchy v. Kansas, 272 U.S. 306, 71 L.Ed. 248.

Columbia River Packers etc. v. Hinton, 315 U.S. 143, 86 L.Ed. 750.

Bakery etc. Union v. Wagshal, 333 U.S. 437, 92 L.Ed. 792.

LIMITS OF SECTION 107 OF 29 U.S.C.A.

As to the conditions and restrictions provided in Section 107 (Act of 1932) upon the granting of injunctive relief by the courts, it is clear that by that section the courts may grant injunctive relief *to protect physical property* from threatened injury by the labor union agents, in any case involving a

"labor dispute", and as between "persons interested in a labor dispute," and in a labor dispute between employer and employees, without restrictions whatever, except that the court must find,

> "(b) That substantial and irreparable injury to complaintant's property will follow:"
> "(c) That as to each item of relief granted, greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;"
>
> * * * *
>
> "(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection."

Thus we see that Section 107 is designed only to protect *physical property*, and does not apply to our case, in which the Court would have no means of measuring appellant's possible damage from shippers' claims and I.C.C penalties. Moreover, there could be no protection of appellant by the police against damages from such sources as appellant is subjected by the Union. Section 107 has no bearing on the question of whether or not the Railway Company is entitled to injunctive relief when there is no question of threatened damage to appellant's physical property.

CONCLUSION

The complaint here states a cause of action for injunctive relief against the pickets occupying appellant Railway Company's right-of-way upon each of the following grounds:

(1) The Federal government is without right or power to make or enforce these statutes setting labor unions apart from the general public as a favored class freed of injunctive proceedings in the courts except that such right and power can be spelled out of the Commerce Clause of the Federal Constitution. And to spell that right and power out of the Commerce Clause, the framers of these ~~local~~ labor laws based them on the two propositions: (a) that every man has the right to cease his employment—to strike—and (b) the strike stops the flow of goods in commerce.

That, of course, is a strained construction of the Commerce Clause of the Federal constitution, and in recognition of that fact, the framers of these labor laws went to great detail to declare "the public polity of the United States with the idea of bringing these labor laws within the Commerce Clause.

To quote parts of that declaration of the public policy:

> "It is declared to be the public policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions . . ."
>
> "Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest," etc. (Act July 5, 1935, 49 Stat. 449; 29 U.S.C.A. 151).

While we all can agree that the declaration by

the Congress of "public policy" does not enlarge or change the Commerce Clause of the Federal Constitution, it is a guide to the interpretation and limits of the labor ~~group~~ laws upon the question of jurisdiction of the courts to grant injunctive relief.

Those limits fall short of protecting the Union's acts against a person from whom no direct relief is sought in the labor dispute and which actually are designed primarily to impede the flow of commerce. The labor laws must be so limited, otherwise they cease to have the protection of the Commerce Clause.

(2) In the labor dispute between the Foley's Mill and the Union, no reilef is sought against the appellant Railway Company and therefore the appellant Railway Company is not "directly or *indirectly*" interested in that labor dispute within the meaning and limits of the labor laws, and therefore the Court's jurisdiction to grant injunctive relief against the defendant pickets is not denied by the labor laws.

(3) The labor laws do not nullify the railroad carrier Acts of Congress which require the appellant Railway Company to serve the struck plant.

(4) The labor laws so limit the jurisdiction of the National Labor Relations Board (29 U.S.C.A Sup. 158) that the question of whether or not the appellant Railway Company, in furnishing rail service to the struck plant, is "doing business with" the struck plant, Foley's Mill, within the meaning of subsection (b) (4) of Section 158 of 29 U.S.C.A. Sup., so as to give N.L.R.B. jurisdiction, or only

complying with requirements of the I.C.C. Acts (49 U. S. C. A. 1) that it furnish the rail service, is beyond the jurisdiction of N.L.R.B. . . .

It seems to us that the line limiting the jurisdiction of N.L.R.B. in these cases involving the picketng of railroads should be drawn at the point where the Union seeks relief directly against the railroad, as in the New Haven case, and that the whole country should not be left in the lap of N.L.R.B. and to the whi mof the Union in the matter of picketing the railroad, solely to bring economic pressure upon a prospective shipper, and where no relief is sought by the Union against the railroad.

Respectively submitted,

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